Commission's Part 32 requirements, all services provided to PBMS by Pacific and Nevada Bell will be at tariffed rates, or if not tariffed, at fully distributed cost unless there is a market rate for such services. Finally, the Plan did not anticipate the sale or transfer of assets between Pacific Bell and Nevada Bell and PBMS. If a sale or transfer of assets does occur, the Plan provides that it will be done in accordance with all applicable rules.[166]

104. Interconnection. PacTel stated that interconnection services are now available to all CMRS providers in California by negotiated agreement, but that Pacific Bell has filed a proposed tariff, which is pending before the California Public Utilities Commission (CPUC).[167] Nevada Bell has an effective interconnection tariff on file with the Public Service Commission of Nevada, and any interconnection services purchased by PBMS from Nevada Bell will be at tariffed rates. PacTel claimed that PBMS will receive the same fair and nondiscriminatory interconnection arrangements and services that Pacific Bell and Nevada Bell provide other CMRS carriers pursuant to state and federal requirements. This includes types of interconnection, speed of installation of facilities, maintenance or repair. In addition, PBMS will collocate equipment on Pacific Bell and Nevada Bell property. PacTel stated that PBMS will pay either fully distributed cost for such services for which there is no tariff price or prevailing price. PacTel argued further that PBMS will receive neither a pricing advantage due to the location of PBMS equipment at Pacific Bell and Nevada Bell facilities, nor a volume discount. PacTel explained that Nevada Bell does not currently offer discount rates for wireless interconnection, and stated that Pacific Bell's discount rates are based on the term of the contract and the individual carrier's projected minutes of use growth and not on total volume. PacTel asserted that all wireless carriers that commit to the same term and growth are eligible to receive the same discount from Pacific Bell.[168]

105. Joint Marketing/CPNI. PacTel stated that it anticipates that PBMS will use the LEC's sales channels for some of its marketing activity, to take advantage of economies of scope identified in the *Broadband PCS Order*. Further, PBMS will compensate Pacific Bell and Nevada Bell pursuant to the Commission's Part 64 rules, and will pay fully distributed cost for these services as well as any other services for which there is no tariff price or prevailing price. In its Reply Comments, PacTel committed to comply with the

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requirements, in Public Notices released, respectively, on January 19, 1995 and July 14, 1995. *See* Public Notice, Carriers File Revision to their Cost Allocations Manuals, 10 FCC Rcd 679 (1995); Public Notice, Carriers File Revisions to their Cost Allocations Manuals, 10 FCC Rcd 7685 (1995). No comments were filed with respect to either set of revisions.

[166] *Id.* at 5-6, 16.

[167] PacTel explained that if the state interconnection tariff is approved, PBMS will purchase interconnection services under the tariff. However, it is uncertain when this could occur, because the ALJ for the CPUC recommended in September, 1994, that the proposed tariff be included in its proceeding on open access framework for network architecture, but no further action was taken.

[168] *See generally* PacTel Plan at 7-13.

Commission's CPNI and network disclosure rules already in place regarding public notification and public disclosure of information.[169]

2. Record in Response

106. Commenters responding to the PacTel Plan raised a number of procedural and substantive issues with respect to the contents of the Plan.[170] In general, as reflected in the Cox comments, opponents of the PacTel Plan argued that the Plan fails to provide effective safeguards against cross-subsidization and interconnection discrimination, and thus fails to address the significant threat to competition that integration of LEC landline monopoly facilities and advanced PCS spectrum poses. Cox claimed that Part 64 accounting rules are inadequate to prevent cross-subsidization because they are designed solely to separate the costs of regulated telephony service from the costs of non-regulated activities, but do not provide guidance for the carriers or the Commission on what appropriately constitutes a "PCS cost" as opposed to a telephone cost. Cox further complained that the benefits of "economy of scope" of integrated operations in this case are illusory because this assertion begs the central question of what costs are properly allocated to PCS and telephony, respectively.[171]

107. Sprint urged that the Plan is defective because, aside from stating that PacTel intends to comply with existing Commission interconnection rules and policies, it fails to provide any basis for the Commission (or anyone else) to assess the carrier's actual compliance with these interconnection requirements. Sprint argued that failure to establish and enforce specific safeguards with regard to LEC interconnection arrangements could seriously impede deployment of new competing networks. Sprint contended that discriminatory policies that allow collocation only for the monopoly LEC affiliate have been acknowledged by the Commission as a danger to fair competition; nonetheless, the Plan suggests that Pacific Bell will allow collocation of PCS facilities only for its PCS affiliates, without providing assurance that other providers will have similar opportunities.[172] Sprint objected that under the Plan, Pacific Bell's PCS affiliates will have an inherent non-pricing advantage if they can physically collocate facilities and maintenance crews at the LEC's end offices without any comparable interconnection offered to similarly situated providers.[173]

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[169] PacTel Reply Comments at 28-31.

[170] *See PacTel Plan Order* at para. 4.

[171] Cox Comments at i-ii.

[172] Sprint Comments at 6-7, *citing* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994).

[173] *Id.* at 8.

Finally, Sprint raised concerns about joint marketing activities between Pacific Bell's telephony and PCS sales personnel.[174]

C. Discussion

1. Preliminary Matters

108. Cellular/PCS Regulatory Parity. As a general matter, we seek comment on whether there are differences between cellular and PCS that justify different regulatory treatment, at least in the short term. We note that PCS was intended to be competitive with both incumbent cellular systems and landline networks, and its identity as a new entrant places PCS providers in a different competitive situation from incumbent cellular carriers. As is evident in the *Broadband PCS* proceeding, the Commission intended that the new personal communications service would compete with cellular service at the outset, and eventually compete with, complement, or, where appropriate, replace landline local exchange service.[175] In addition, PCS providers face competitive hurdles unlike those existing when the cellular service was established, such as auction payments, competition with incumbent cellular providers themselves, and the need, in some case, to relocate incumbent microwave users before PCS can become fully operational. Permitting LECs greater flexibility in the provision of PCS than the BOCs enjoy with respect to cellular was part of the Commission's plan to get PCS into the market quickly, and to encourage the LECs to engineer their network architectures in a "PCS-friendly" manner. This added degree of flexibility may act as a counterbalance to the competitive hurdles unique to PCS. We seek comment whether this analysis pertains today in the same way as when the Commission established PCS as a new service.

109. We continue to believe that it serves the public interest to permit the LECs, including the BOCs, flexibility in the provision of PCS through nonstructural safeguards as part of our efforts to introduce greater competition to the CMRS market. LEC participation in PCS was originally considered very important to getting the service started quickly, and on a broad scale, so as to provide vigorous competition to incumbent cellular providers, and this public interest benefit continues to inform our judgement regarding the need to permit flexibility in service provisioning. We also believe, however, that such PCS safeguards should go beyond the joint cost accounting safeguards specifically identified in the *Broadband PCS Order,* and the case-by-case approach that has served until now.

110. Need for Uniform Safeguards. Our decisions in the *Computer II* and *Computer III* proceedings set forth alternative comprehensive frameworks for competitive safeguards. In contrast, the *Broadband PCS Order* stated simply that LECs must implement an acceptable plan for nonstructural safeguards prior to commencing service, and identified only existing

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[174] *Id.* at 9.

[175] *See, e.g., Broadband PCS NPRM,* 7 FCC Rcd at 5701-07.

accounting safeguards as specifically applicable to LEC provision of PCS.[176] In light of our experience in evaluating the Nonstructural Safeguards Plan filed by PacTel, we now believe it appropriate to establish the safeguards which we contemplated in the *Broadband PCS* proceeding, and require that all Tier 1 LECs providing PCS in their in-region states comply with a uniform set of service safeguards. We believe that the *Competitive Carrier* separate affiliate requirements offer a suitable middle path between the two alternatives of the *Computer II* structural and *Computer III* nonstructural safeguards. The *Competitive Carrier* model does not create the costs and administrative burdens of independent operation requirements and offers the carriers greater flexibility in structuring their competitive businesses. We believe the added flexibility is important if PCS is to enter the market quickly and reach its full potential. At the same time, this regulatory model offers competitors and the Commission greater visibility for the detection of any anticompetitive behavior on the part of LECs.

111. We believe that the imposition of competitive safeguards in addition to accounting safeguards for LEC provision of in-region broadband PCS will serve the public interest. We further believe that this step was foreshadowed by the Commission's suggested requirement that LECs file Nonstructural Safeguards Plans with the Commission prior to commencing PCS operations. If accounting safeguards were all that were intended in the *Broadband PCS Order*, then such a plan would be superfluous for the largest LECs, because they are already under an obligation imposed in Part 64 to make the appropriate changes in their Cost Allocation Manuals.[177] Furthermore, the suggested requirement of the Nonstructural Safeguard Plan was also intended to address the carriers' safeguards against discriminatory interconnection practices, as PacTel has clearly understood. We believe it is time to replace our initial case-by-case approach with a uniform set of requirements. This should be more efficient for both the carriers and the Commission, as it will streamline the review process and provide a consistent regulatory framework for future competition. In addition, the *Broadband PCS Order*'s decision that nonstructural safeguards would be sufficient for LEC PCS rested, in part, on the cellular/PCS cross-ownership rules "to ensure that LECs do not behave in an anticompetitive manner."[178] In a recently released Notice, we seek comment on whether our PCS/cellular cross-ownership rule should be relaxed or simplified.[179] Thus, our

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[176] *Broadband PCS Order*, 8 FCC Rcd at 7748 n.98, 7751-52.

[177] *See* 47 C.F.R. § 64.903.

[178] *Broadband PCS Order*, 8 FCC Rcd at 7751.

[179] *See* Amendment of part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, GEN Docket 90-314, Notice of Proposed Rule Making, FCC 96-119 (released March 20, 1996) (*CMRS Spectrum Cap;Cellular\PCS Cross-Ownership Notice)*. This Notice responds to the *Cincinnati Bell* decision, in which the court held that our cellular/PCS cross-ownership rule and 20 percent attribution rule are arbitrary, and remanded these issues, together with the BOC cellular structural separations issue, to the Commission for further proceedings. Specifically, we sought comment on whether to eliminate our PCS/cellular cross-ownership limitations and our 40 MHz PCS spectrum cap in favor of the single

proposed changes to the cross-ownership rules also argue in favor of reconsideration of the sufficiency of the nonstructural safeguards currently in place for LEC PCS. We seek comment on this analysis.

112. It is evident that the potential costs of imposing additional nonstructural safeguards on LEC provision of PCS at this time are different from the costs for either retaining structural separation for BOC cellular service, or for extending such structural separation requirements for the first time to other LECs, such as GTE. In the case of BOC cellular service, the costs of establishing the subsidiary have already been incurred, whereas in the case of the independent LECs, the re-arrangement of existing corporate structures would entail additional costs of a particular scope and nature. We also recognize that, in the case of an entirely new service such as in-region LEC broadband PCS, the start-up costs of structural separation would likely be of a different nature and scope altogether. Few LECs currently have in-region PCS licenses as a result of our cellular-PCS cross-ownership and spectrum cap requirements. It is also not clear, with the exception of Pacific Bell, which has already filed its Plan of Nonstructural Safeguards for PCS, how far along those other LECs are in building-out their PCS networks and in structuring their PCS operations from an organizational perspective. We seek comment on this analysis and on the relative costs of imposing the requirements we propose in this section.

113. In-Region/Spectrum Allocation Limitations. With respect to the imposition of nonstructural safeguards, the *Broadband PCS Order* did not distinguish between in-region versus out-of-region PCS, nor did it distinguish among LEC PCS providers on the basis of the amount of PCS spectrum they would be utilizing to provide service. Many of the comments in response to the PacTel Plan identified the dangers of fully integrated LEC provision of broadband PCS, through a 30 MHz license, in the same service area in which the LEC is the incumbent local exchange provider. Echoing this distinction, U S West, in a recent *ex parte* submission, has argued that the Commission recognized in the *Broadband PCS Order* the significant potential consumer benefits associated with permitting LECs to hold 10 MHz PCS licenses and provide in-region PCS service on an integrated basis. U S West further contends that existing accounting safeguards are adequate for LEC provision of in-region 10 MHz PCS.[180]

114. As we found with respect to cellular service in Section III, above, we do not believe that the competitive dangers of integrated LEC provision of landline and PCS outside of the local exchange service areas in which they are the incumbent LEC raises the same concerns as in-region integrated services. In fact, we have found that out-of-region

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45 MHz CMRS spectrum cap. Under such a rule, cellular operators would be permitted to acquire licenses for two 10 MHz blocks of broadband PCS spectrum. *Id.* at para. 66.

[180] *Ex Parte* Letter from Eldridge A. Stafford, U S West, Inc., to Mr. William F. Caton, Acting Secretary, FCC, dated March 15, 1996, attaching *ex parte* Letter from Eldridge A. Stafford, U S West, Inc., to Ms. Barbara Esbin, Commercial Wireless Division, FCC, dated March 15, 1996, at page 4, *citing Broadband PCS Order*, 8 FCC Rcd at 7751-52, para. 26.

competition from LECs offering integrated service packages will promote local exchange competition.[181] We therefore propose to limit LEC PCS nonstructural safeguards to in-region broadband PCS service. We seek comment on this tentative conclusion. In addition, we seek comment on the relevance of the distinction raised in the record between LEC holders of 30 MHz versus 10 MHz in-region PCS licenses for our proposed uniform nonstructural safeguards. Specifically, we seek comment on whether we should exempt LEC licensees with no more than 10 MHz of PCS spectrum from some or all of the competitive safeguards discussed herein, with the exception of those safeguards which arise from the provisions of the 1996 Act. We also seek comment on the effect of the proposed rule changes described in the *CMRS Spectrum Cap; Cellular\PCS Cross-Ownership Notice* have on the safeguards under discussion.

115. Applicability to Tier 1 LECs. We believe that our goal of regulatory symmetry should be tempered by a realistic assessment of the costs and benefits of applying our proposed competitive safeguards to small telephone companies. We note that small telephone companies, particularly those operating in rural areas, are uniquely positioned to provide wireless services to populations which might otherwise not receive them.[182] We wish to take no action that would unduly burden or discourage small telephone company entry into cellular and PCS markets nor do we believe that these companies pose a significant threat of anticompetitive conduct toward potential wireless competitors, as their ability to leverage their bottleneck local exchange facilities is limited as compared to that of the BOCs and the larger independents. On the other hand, we also seek to ensure that the local exchange and exchange access customers of the small telephone companies are not unduly burdened with the costs of these companies' ventures in competitive wireless markets. We therefore would apply the uniform set of competitive safeguards that we propose here only to the Tier 1 LECs. We seek comment on this proposal and on what changes, if any, to our accounting rules are necessary or appropriate to ensure that LECs not subject to our proposed competitive safeguards will not cross-subsidize PCS activities from the regulated telephone ratebase.

2. Proposed Competitive Safeguards for LEC In-Region PCS

116. The Wireless Telecommunications Bureau recently permitted the PacTel Plan to take effect, subject to amendments made necessary by the changes contained in the 1996 Act with respect to CPNI,[183] and also advised PacTel to include in this filing any other modifications which it deems necessary to bring its Plan into full compliance with the recent

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[181] *SBMS Waiver Order* at para. 20.

[182] *See, e.g.,* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 9 FCC Rcd 5532 (1994) (permitting geographic partitioning of PCS service areas to rural telephone companies as effort to promote PCS to otherwise under-served populations).

[183] Section 222(c)(2). There are exceptions to these restrictions. *See* Section 222(d).

legislation.[184] Upon review of the record in the PacTel Plan proceeding, we have decided to use the five elements PacTel identified in its Plan, as modified by the Bureau's Order, as the basis of the competitive safeguards that we propose in this Notice. That is, we propose that all Tier 1 LECs providing broadband PCS within their in-region states should implement a nonstructural safeguard plan, and file the plan for approval with this Commission, that includes the following elements: (1) a description of a separate affiliate, as defined herein, for the provision of PCS; (2) a description of compliance with our Part 64 and Part 32 accounting rules, with copies of the relevant CAM changes attached; (3) a description of planned compliance with all outstanding interconnection obligations; (4) a description of compliance with all outstanding network disclosure rules; and (5) a description of planned compliance with the CPNI requirements in new Section 222 of the Act.[185]

117. Separate Affiliate. PacTel has presented a convincing justification for its choice of a separate affiliate to provide its PCS service, from both a business and a regulatory standpoint. For the reasons we have previously identified, requiring the LEC to establish a separate affiliate to provide a competitive service lessens the opportunities for cost-shifting, price discrimination and interconnection discrimination, and increases the ability of both competitors and the Commission to detect any anticompetitive behavior. As PacTel argued, the separate affiliate structure makes it easier to track PCS costs and to keep those costs separated from regulated telephone costs. It also decreases the scope of any joint and common costs from the outset. We also note that BellSouth has established a separate affiliate, "BPCI," for the provision of its in-region PCS, and similarly, Ameritech established ACI as the vehicle to provide its in-region integrated landline and cellular services. Thus, it would appear to be an unexceptional and reasonable business practice to enter into new competitive ventures through a separate corporate affiliate. In addition, it is consistent with the approach taken by Congress in the 1996 Act with respect to BOC entry into previously prohibited or restricted services. For these reasons, we propose to require that LEC in-region broadband PCS services should be provided through a corporate affiliate that is separate from the local exchange carrier.

118. We propose to require this affiliate to meet the separation conditions outlined in the 1985 Competitive Carrier *Fifth Report and Order*. That is, the affiliate must: (1) maintain separate books of account;[186] (2) not jointly own transmission or switching facilities with the exchange telephone company; and (3) obtain any exchange telephone company-

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[184] *PacTel Plan Order* at para. 9.

[185] 47 U.S.C. § 222.

[186] Books of account refer to the financial accounting system a company uses to record, in monetary terms, the basic transactions of a company. These books of account reflect the company's assets, liabilities, and equity, and the revenues and expenses from operations. Each company has its own separate books of account. The Commission's Part 32 rules, the Uniform System of Accounts (USOA), prescribe the books of account for the telephone companies. The Part 32 USOA reflects the telephone company's total operations. The Part 32 USOA, however, is not required to be kept by affiliates of a telephone company. These affiliates maintain their own separate books of account.

provided communications services at tariffed rates and conditions. We propose to modify the second requirement to conform with our proposed modification of the facilities-sharing prohibition of Section 22.903(a). That is, the separate PCS affiliate would not be permitted to have joint ownership with the incumbent LEC of transmission and switching facilities that the latter uses in the provision of landline services in the same in-region market. We note that this proposed requirement would not include requirements for separate officers, separate debt, or independent operation of the PCS affiliate. Any joint research or development would be subject to Part 64 accounting separations. We seek comment on these proposals.

119. In the *Fifth Report and Order* and in the recent *BOC Out-of-Region Notice*, the Commission found that the requirements discussed there would not impose excessive burdens on LECs, while providing "some, albeit not complete, protection against cost-shifting and anticompetitive conduct."[187] We tentatively conclude that this is also true in the case of Tier 1 LEC in-region PCS, in that the *Competitive Carrier* separate affiliate requirement permits greater flexibility for the LEC than the Section 22.903 structural separation requirement, while preserving the competitive safeguards of separate books of account, facilities, and tariffed services between the PCS affiliate and its affiliated LEC. We seek comment on the effect that changes in interconnection tariffing requirements under Sections 251 and 252 of the 1996 Act have on the requirement that the separate affiliate obtain any exchange telephone company service at tariffed rates and conditions. In addition, we tentatively conclude that, consistent with Section 601(d) of the 1996 Act and the interim approach proposed above with respect to BOC cellular services, joint marketing of PCS and LEC landline services should be permitted on a compensatory, arm's length basis. Any such joint marketing must be subject to our Part 64 cost allocation and affiliate transaction rule and the CPNI requirements discussed below. We seek comment on these tentative conclusions.

120. Accounting Safeguards. In its Nonstructural Safeguards Plan, PacTel described its compliance with our Part 32 and 64 cost allocation rules, and included descriptions of changes to its Cost Allocation Manual to reflect its PCS expenditures and transactions. We believe that this type of description is sufficient to satisfy our procedural CAM disclosure requirements. In particular, this filing should address the separation of costs engendered by joint marketing operations. Even with these filing requirements, we believe that only an annual audit will help determine compliance with our accounting, affiliate transaction and cost allocation rules. We note that all CAM changes are also subject to comment and review by the Commission and interested parties. We believe that a description of the carrier's procedures to ensure compliance with our Part 32 and 64 rules, together with copies of the relevant CAM changes, is sufficient for purposes of our initial review of the carriers' Nonstructural Safeguards Plans. This initial review will determine whether adequate accounting procedures are in place. The company's compliance with these procedures, however, can only be determined through the existing annual audit process. We seek comment on this analysis.

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[187] *Fifth Report and Order*, 85 FCC 2d at 1198.

121. CPNI. In our discussion above on BOC cellular operations and the implementation of the 1996 Act, we addressed the effects of the new Section 222 of the Act, which applies to all telecommunications carriers with respect to the use and protection of CPNI.[188] We seek comment on whether the same type of organizational and procedural guidelines for the protection and dissemination of CPNI for which we are seeking comment relating to BOC cellular operations, should apply to the PCS operations of any LEC (including non-Tier 1 LECs) or interexchange carrier possessing CPNI gathered in the provision of landline services. We also seek comment as to whether there are any circumstances under which we should forbear from requiring a description of such organizational structures and procedures, and rely instead on enforcement procedures for any violations of the CPNI statutory mandates. Such circumstances could include a weighing of relative costs and benefits, as well as the significance of the CPNI at issue. In this regard, we tentatively conclude that we need not require the filing of such descriptions by non-Tier 1 LECs and non-dominant interexchange carriers holding PCS licenses. We seek comment on this tentative conclusion and this issue generally. In addition, we seek comment whether, for purposes of applying new Section 222 of the Act, cellular service and PCS should be considered the same "service" (*i.e.*, commercial mobile radio service) such that CPNI gained in the provision of one could be utilized without restriction in the marketing of the other. We also seek comment whether other CMRS, such as paging and Specialized Mobile Radio, should be considered the same "service" as cellular service and PCS for purposes of implementing Section 222 and what distinctions, if any, we should make among these different types of CMRS. Finally, we seek comment whether a toll service provided by means of CMRS (*e.g.*, cellular long distance) should be treated as a distinct "telecommunications service" for purposes of implementing the new Section 222.

122. Interconnection. As we indicated in our discussion of interconnection with respect to BOC cellular safeguards, we observe that the changes effected by the 1996 Act with respect to LEC interconnection obligations, together with the changes proposed in our *LEC/CMRS Interconnection Compensation* rulemaking, are intended to diminish the incidence of discriminatory interconnection practices. These same concerns regarding interconnection discrimination inform our consideration of whether to eliminate immediately the structural separation requirements for BOC cellular services.

123. In the case of LEC PCS, and without prejudice to our decision on BOC cellular structural separation, we believe that two factors render a lesser degree of separation appropriate. First, and most importantly, the public interest benefits we anticipate from permitting LECs somewhat more flexibility in establishing their PCS operations counterbalance the loss of the added level of protection that complete structural separation under Section 22.903 provides. Our proposal that LECs establish nonstructurally separate affiliates for the provision of in-region PCS is intended as an interconnection safeguard that will render visible the LEC's interconnection arrangements with its affiliate. The second

[188] 47 U.S.C. § 222. Unlike 47 C.F.R. § 22.903(f), there are no rules specifically addressing CPNI in Part 24 or other CMRS rules.

factor is one of timing. Commenters opposing the PacTel Plan raised a number of specific objections to PacTel's Plan despite the carrier's establishment of a separate affiliate for PCS, including objections to the collocation arrangements PacTel offers its affiliate. We believe that, for the most part, the types of interconnection discrimination problems identified by the commenters will be largely addressed by the pending regulatory changes with respect to LEC interconnection set in motion by the 1996 Act and our rulemakings thereunder, which will be contemporaneous with PCS start-up in many areas of the country . In the meantime, our possible retention of structural separation for the in-region BOC cellular service may act as additional protection against anticompetitive actions with respect to PCS competitors of the BOC cellular providers who are seeking interconnection arrangements. We seek comment on this proposal, and ask that parties disagreeing with our interpretation of the likely effect of the legislation and our implementation rulemaking provide specific examples and argument in support of their position.

124. Network Information Disclosure. As we stated in Section III, the new interconnection provisions of the 1996 Act make it a duty of incumbent local exchange carriers "to provide reasonable public notice of changes to the network necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as any other changes that would affect the interoperability of those facilities and networks."[189] of network technical In light of the statutory provision regarding public notice by incumbent LECs of network technical changes and our implementation of that provision, we seek comment on the need for specific PCS rules pertaining to network information disclosure. Commenters supporting a specific Part 24 rule should provide information about particular technical or regulatory issues to be addressed by such a rule.

3. Sunset

125. With respect to LEC in-region broadband PCS, we have proposed a set of flexible service safeguards that, we believe, strike an appropriate and non-obtrusive balance between our pro-competitive goals and our goal of expediting in-region LEC-provided broadband PCS service. Nonetheless, assuming that competition in the local exchange market increases to the point where LECs do not have market power in the provision of local exchange service, we anticipate that those safeguards that are not mandated by statute could be relaxed or eliminated. We therefore seek comment on whether the rules proposed here should be subject to a sunset provision. We also seek comment on the appropriate term of such a provision, or the conditions that would justify relaxing or eliminating these restrictions in the future.

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[189] *See* 47 U.S.C. § 251(c)(5).

D. Safeguards for Other CMRS

126. We also note that Congress created the CMRS regulatory classification and mandated that similar commercial mobile radio services be accorded similar regulatory treatment under our rules. Therefore, we tentatively conclude that the nonstructural safeguards discussed above for LEC provision of PCS should apply to Tier 1 LEC provision of other in-region CMRS. We seek comment on this proposal.

VII. CONCLUSION

127. Dynamic changes are taking place in the telecommunications industry, as judicially-imposed restrictions give way to a legislative mandate to open markets and to promote an interconnected network of networks. We believe that the proposals that we make in this Notice are consistent with that mandate and will promote competition in wireless communications markets by applying the least intrusive means to curb the residual market power of the local exchange carriers. We take seriously our proposal to sunset those rules which become no longer necessary after further changes in the telecommunications industry, wrought by the Telecommunications Act of 1996, are in place. We intend to move rapidly to complete the comprehensive review of our CMRS safeguards initiated by this Notice, and to put into place new, streamlined rules which accomplish our goals of promoting wireless competition, limiting the exercise of market power, and establishing regulatory symmetry.

VIII. PROCEDURAL ISSUES

A. *Ex Parte* Presentations

128. This is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

B. Initial Regulatory Flexibility Analysis

129. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this Notice of Proposed Rulemaking. Written public comments are requested on the IRFA.

130. Reason for Action: The Commission is issuing this Notice of Proposed Rulemaking to review our regulatory regime for the provision of commercial mobile services, and to implement certain provisions of the Telecommunications Act of 1996. The proposals advanced in the Notice of Proposed Rulemaking are designed to explore whether the BOC separate subsidiary requirement of Section 22.903 continues to be relevant in today's

marketplace. The Notice also proposes streamlined safeguards for Tier 1 LECs seeking to provide PCS and other commercial mobile services.

131. Objectives: The objective of the Notice of Proposed Rulemaking is to provide an opportunity for public comment and to provide a record for a Commission decision regarding appropriate competitive safeguards for landline telephone companies seeking to provide wireless services. The Notice proposes two alternatives for modification of Section 22.903, the BOC/cellular separate subsidiary requirement. The first alternative is to retain the rule for in-region provision of cellular service, subject to a sunset period. The second alternative is to eliminate the rule immediately for in-region cellular services. (The Commission waives the requirement for out-of-region cellular service.) Further, the Notice proposes a uniform set of safeguards for Tier 1 LECs seeking to provide PCS and other CMRS services.

132. Reporting, Recordkeeping and Other Compliance Requirements: The LEC/PCS safeguards proposed in the Notice would require that Tier 1 LECs submit to the Commission a nonstructural safeguards plan. Smaller LECs would not be subject to this requirement.

133. Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

134. Description and Number of Small Entities Involved: Because Section 22.903 only applies to the BOCs and because the proposed LEC/PCS safeguards would apply only to the 23 Tier 1 LECs (including the BOCs), no small entities would be affected by the proposals included in the Notice of Proposed Rulemaking.

135. Significant Alternatives Mimizing the Impact on Small Entities Consistent With the Stated Objectives: The Notice proposes to adopt LEC/PCS safeguards only for Tier 1 LECs and not for smaller LECs. A Tier 1 LEC is a local exchange carrier with over $100 million in revenues from regulated telecommunications operations that are subject to the CAM filing requirements of Section 64.903 of the Commission's Rules. The Commission notes that small telephone companies are uniquely positioned to provide wireless services to populations that might otherwise receive them. The Notice points out that the Commission wishes to take no action that would unduly burden or discourage small telephone company entry into cellular and PCS markets, nor do we believe that these companies pose a significant threat of anticompetitive conduct toward potential wireless competitors.

136. Legal Basis. The Notice of Proposed Rulemaking is adopted pursuant to Sections 1, 2, 4, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, and 332.

137. IRFA Comments. We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses of the IRFA and must be filed by the deadline for comments in response to the Notice of Proposed Rulemaking.

C. Initial Paperwork Reduction Act of 1995 Analysis

138. This Notice of Proposed Rulemaking (NPRM) contains a proposed information collection. As part of its continuing effort to reduce paperwork burdens, the Commission invites the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this NPRM; OMB comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Filing Procedures

139. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 30 days after a summary of this *Notice* is published in the Federal Register, and reply comments on or before 51 days after a summary of this *Notice* is published in the Federal Register. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments should follow the outline of topics contained in this Notice. Parties are urged not to repeat the regulatory history contained in this Notice, or the arguments they have already submitted that are summarized in this Notice, and to make their comments as concise as possible. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with two copies to Bobby Brown, Wireless Telecommunications Bureau, 2025 M Street, N.W., Room 7130, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

140. Written comments by the public on the proposed information collection are due on or before 30 days after a summary of this *Notice* is published in the Federal Register. Written comments must be submitted by OMB on the proposed information collection on or before 60 days after date of publication in the Federal Register. In addition to comments filed with the Secretary , a copy of any comments on the information collection contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street , N.W., Washington, D.C. 20554, or via the Internet to dconway@fcc.gov and

to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via the Internet to fain_t@al.eop.gov.

E. Ordering Clauses

141. Accordingly, IT IS ORDERED that pursuant to Sections 1, 4, 222, 252(c)(5), 301, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 222, 252(c)(5), 301, and 303, and Section 601(d) of the Telecommunications Act of 1996, 47 U.S.C. § 152, a NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

142. IT IS FURTHER ORDERED that, pursuant to Sections 1.3 and 22.19 of the Commission's Rules, 47 C.F.R. §§ 1.3, 22.19, all Bell Operating Companies are hereby granted a WAIVER of the provisions of Section 22.903 of the Commission's Rules, 47 C.F.R. § 22.903 with respect to the provision of cellular service outside of their in-region service areas as defined herein.

143. IT IS FURTHER ORDERED that, pursuant to Sections 1.3 and 22.19 of the Commission's Rules, 47 C.F.R. §§ 1.3, 22.19, a waiver of Section 22.903 with respect to the provision of cellular service outside of their in-region service areas as defined herein, is GRANTED to Bell Atlantic NYNEX Mobile, Inc. and U S West, Inc.

144. IT IS FURTHER ORDERED that, the Secretary shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq. (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A:
Record on the Need for Section 22.903

1. Regulatory Parity/BOC Dominance[1]

BellSouth argues that today, unlike 1981 when AT&T was the monopoly provider, there is no reason for singling out the Bell Companies for more restrictive cellular regulation than that governing other LECs with respect to wireless services. BellSouth argues that now, no single company dominates local exchange service throughout the nation. Moreover, it cites statistics indicating that GTE is now the largest U.S.-based local telephone company, with revenues exceeding those of every Bell Company. Similarly, BellSouth observes that in the cellular market, Bell Companies do not have the dominant position. Rather, AT&T is once again in the leading position for cellular, and is one of the five largest cellular/PCS carriers, along with Airtouch, GTE and Sprint and the Bell Companies. BellSouth asserts that GTE is now a more ubiquitous provider of both landline and landline service than most, if not all, of the Bell Companies, nonetheless, GTE is free to provide service in an integrated fashion.[2] In response to the *Cincinnati Bell Order*, BellSouth argued that regulatory parity considerations required the immediate elimination of BOC cellular structural separation because this requirement disadvantages BellSouth and its customers vis-a-vis PCS licensees who are not required to establish separate corporate entities for their PCS operations.[3]

In contrast, AT&T contends that, given the BOCs' continued control of essential landline facilities, the anticompetitive consequences of the elimination of structural separation far outweighs any possible benefits to consumers. AT&T claims that BOCs continue to abuse their control of local exchange bottlenecks to disadvantage wireless competitors with respect to interconnection, as they have since the inception of cellular service, and that interconnection issues are likely to become increasingly contentious in the future as the new CMRS entrants enter into initial interconnection negotiations. According to AT&T, access to the landline network will be of paramount importance to these competitors, and the

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[1] The majority of the comments summarized in this Appendix were drawn from the record developed in the BellSouth Resale Request proceeding prior to BellSouth's withdrawal of that request. The pleading cycle established on the BellSouth Request closed on September 18, 1995. Comments were filed by U S West, Inc. (U S West); Bell Atlantic Corporation (Bell Atlantic); SBC Communications [Southwestern Bell] (SBC); Northern Telecom, Inc. (Northern Telecom); Pacific Bell Mobile Services (PBMS); AirLink, L.L.C. (AirLink); AT&T Wireless Services, Inc. (AT&T Wireless); Radiofone, Inc. (Radiofone); MCI Telecommunications (MCI); Nextel Communications, Inc. (Nextel); Sprint Telecommunications Venture (Sprint Telecom); and National Wireless Resellers Association (NWRA); Communications Workers of America (CWA); National Consumers League; and United Homeowner's Association. Reply comments were received from BellSouth on September 25, 1995. Supplemental Comments were received from AT&T Wireless on September 27, 1995.

[2] BellSouth Request at 13-17.

[3] *Ex Parte* Letter from David J. Markey, BellSouth Corporation to the Honorable Reed E. Hundt, Chairman, FCC, dated November 20, 1995.

Commission should not jeopardize competition by removing an important means for assuring that this access will be provided on a fair and nondiscriminatory basis.[4]

AirTouch, Comcast and Cox argue that effective wireless competition with LECs is dependent upon effective LEC wireless safeguards, because without adequate policies, the incumbent LECs will leverage their monopoly power from their wired networks into new markets and into the wireless industry. They observe that LECs are not like other wireless industry participants. AirTouch, Comcast, and Cox maintain that after over 75 years of government-granted monopoly status, LECs have amassed enormous capital, plant and equipment, and human resources as well as essential bottleneck facilities that can be used to forestall competition. Additionally, they argue, LECs have a huge competitive advantage over other potential service providers because of their unique access to customer proprietary network information and customer calling habits. Any regulatory framework that does not account for the presence of these overwhelming advantages will fail to encourage the development of local loop competition, according to AirTouch, Comcast, and Cox.[5]

In response to BellSouth's Resale Request, many other commenters note that the BOCs are still the dominant providers in the local exchange market and argue therefore, that relief should not be granted to BellSouth, or any of the BOCs, until vigorous competition in broadband wireless services has been achieved. Sprint states that the structural separation rules were adopted to prevent improper cross-subsidization and interconnection abuses, which can only be committed by a firm with market power, which the BellSouth, as well as nearly all the LECs, continue to possess in the local exchange market, despite emergent local exchange competition. Sprint therefore urges the Commission to take a cautious approach to relief from the structural separation requirement.[6]

Sprint cites the McCaw/AT&T Consent Decree and the BOC MFJ Wireless Waiver Order as examples of ways in which the market power of a dominant carrier is controlled to prevent unfair leveraging in competitive markets (i.e., cellular duopolist/competitive long distance markets). Sprint argues that the case for restraint of market power is even more compelling when a cellular carrier's market power is integrated with that of an incumbent LEC that retains nearly 100 percent of the local service customers in its operating area.[7] AT&T Wireless and AirLink argue that BellSouth's comparison of itself to GTE and AT&T is misleading because structural separation was not adopted due to BOC presence in the *wireless* market and it should not be eliminated or waived because other non-BOC companies have a greater *wireless* reach than BellSouth on a nationwide basis. AirLink observes that

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[4] *See, e,g,,* AT&T Comments at 3-14.

[5] Joint Safeguards Ex Parte, at 6-7.

[6] Sprint Comments at 4-8.

[7] Sprint Comments at 5-8, *citing* Stipulation of Final Judgment, *United States v. AT&T Corp. and McCaw Cellular Communications, Inc.*, Civil Action No. 94-01555 (HHG).

"[w]hile AT&T may be seeking to use wireless services as a strategy to enter the local exchange market this is merely an *entry* strategy".[8] Nextel observes that where the Commission has permitted BOCs and other local exchange carriers to enter a competitive market on an integrated basis, it has found it necessary to apply alternative safeguards, including, interim access plans, network information disclosure rules, customer proprietary network information requirements, and usage and line-count reporting requirements.[9]

Nextel dismisses BellSouth arguments that AT&T, MCI, Sprint and GTE are competitive threats to its ability to provide its customers with "one-stop shopping" because these carriers are not yet providing local service within BellSouth's territory. Nextel urges that there must be some relation between BOC integrated landline and wireless offerings, and the ability of other carriers to offer such service packages. Thus, Nextel, in effect, asks the Commission to look at the state laws regarding local exchange competition in determining whether relief from structural separations is appropriate for a particular BOC, because in states where local exchange competition is not yet permitted, integrated landline local exchange and wireless services should not present a competitive threat to the BOC.[10]

2. Cross-Subsidy Issues[11]

Cross-Subsidy Arguments Relevant to Structural Separation. According to BellSouth, "[t]he cellular separation rule was adopted in a very different era, during the transition to a competitive telecommunications environment." BellSouth contends that the structural separation requirement may have made sense during the era of rate base/rate of return regulation, marked by both acknowledged and hidden "contributions" or "cross-subsidies" among telephone services -- interstate and intrastate, local exchange and interexchange, competitive and monopoly. However, BellSouth avers, all of that changed with the advent of access charges, price caps and the removal of competitive services from the regulated rate base. Increasingly, BellSouth maintains, the Bell Companies have no meaningful source of "monopoly" funds from which to subsidize cellular service. Under state regulation, BellSouth argues, local exchange service rates have been kept low for years, and local exchange service

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[8] AirLink Comments at 2-5; AT&T Comments at 2-6.

[9] Nextel Comments at 4-6. Nextel cites the example of the Commission's rulemaking regarding the provision of international message telecommunications service (IMTS) between the island of Puerto Rico and off-island points. *See* Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 2 FCC Rcd 6600 (1987), *aff'd on recon.*, Memorandum Opinion and Order, 8 FCC Rcd 63 (1992). *Id.* at n. 11.

[10] Nextel Comments at 5-9.

[11] The summaries in this section focus on the cross-subsidy issues raised in response to the BellSouth Resale Request that were directed at the broader question of whether Section 22.903 continues to serve the public interest. More specific arguments regarding the direct provision of resold cellular and landline local exchange service by the BOC in its service area are discussed in Section IV above, with respect to implementation of Section 601(d) of the 1996 Act.

revenues are under competitive pressure from competing local exchange providers such as AT&T, MCI, and Sprint. BellSouth also contends that intraLATA toll service is very competitive; access charges have been lowered time and again; and that there are simply no meaningful source of subsidy in light of the profound changes that have taken place in telecommunications regulation in the last fourteen years. As a result, BellSouth states, LECs have neither the incentive nor the ability to cross-subsidize cellular service.[12]

Moreover, BellSouth argues, the Commission has comprehensively revised the Uniform System of Accounts and adopted rules and policies in the *Joint Cost Order* governing joint and common cost allocations and affiliate transactions. It contends that there have been no cross-subsidy problems from the unseparated offerings of landline local and cellular service by the non-BOC local exchange carriers (LECs) such as GTE in over a decade. BellSouth states that, in the fourteen years since structural separation was adopted, the Commission has found no evidence of landline cross-subsidization of cellular service.[13]

In response, commenters cite numerous ways in which cross-subsidization may yet occur. MCI contends that the "economies of scale" that BellSouth refers to are nothing more than monopoly leveraging and cross-subsidization in disguise.[14] Sprint and AT&T warn that a LEC, such as BellSouth, if permitted to integrate cellular and local exchange service offerings, could, without detection, price retail cellular offerings below cost and subsidize the loss through their already excessive rates for LEC/CMRS interconnection.[15] MCI argues that cross-subsidies could occur under integrated cellular and landline operations through transfers of trained personnel, and joint marketing.[16] Radiofone also argues that cross-subsidy can be effectuated in subtle ways such as misassignment of personnel time, CPNI abuses, and misallocation of marketing costs.[17]

Nextel observes that in the last two years, audits conducted by National Association of Regulatory Utility Commissioners (NARUC) have confirmed that both the Pacific Telesis Group and Ameritech Services, Inc. have engaged in extensive cross-subsidization between their landline operations and their affiliated companies, and that recent audits of various BOCs conducted by the Commission have uncovered significant accounting and reporting rule

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[12] BellSouth Resale Request at 7-8.

[13] BellSouth Request at 7-9.

[14] MCI Comments at 13.

[15] AT&T Comments at 7; Sprint Comments at 2-3.

[16] MCI Comments at 11; *accord* Nextel Comments at 12-13 (personnel shifts).

[17] Radiofone Comments at 4-5.

violations.[18] Nextel argues that nonstructural safeguards simply have not been successful in deterring cross- subsidization.[19] It notes that the sharing of personnel raises additional issues regarding the ability of competitors and regulators to detect cross-subsidization.[20] Finally, Nextel contests BellSouth's assertion that price caps serve as an additional preventative against cross-subsidization, relying on a report prepared in the LEC Price Cap Performance Review proceeding on behalf of Cox Enterprises, Inc., that purports to demonstrate that the Commission's existing price cap regime preserves the ability of the BOCs to cross-subsidize for the benefit of their affiliates providing newly developed, competitive services.[21] In addition, some commenters, including Airlink and MCI, note that because cellular rates are no longer subject to tariff, detection of landline to wireless cross-subsidization is made more difficult.[22]

In general, BellSouth replies to opponents' concerns about cross-subsidization by arguing that it will have no meaningful opportunity or incentive to engage in such cross-subsidization, and that nonstructural safeguards are sufficient to deter any cross-subsidization that could possibly occur, just as the Commission has found true for PCS and SMR.[23] BellSouth further argues that the Commission and the courts have repeatedly found that its existing nonstructural safeguards are sufficient to protect against cross-subsidization when LECs provide facilities-based wireless services such as PCS and SMR service on a structurally unseparated basis.

Cross-Subsidy Arguments Specific to BOC Resale of Cellular Service. Sprint and AT&T warn that the LEC could, without detection, price retail cellular offerings below cost and subsidize the loss through its already excessive rates for LEC/CMRS interconnection.[24] AT&T notes that this could be accomplished directly, or indirectly through methods such as

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[18] Nextel Comments at 11, *citing* "An Audit of the Affiliate Interests of the Pacific Telesis Group," NARUC (released July 1994) and "Review of Affiliate Transactions at Ameritech Services, Inc.," NARUC (released May 1995); Order to Show Cause, 10 FCC Rcd 5099 (1995) (Bell Atlantic); Notice of Apparent Liability for Forfeiture and Order to Show Cause, 5 FCC Rcd 7179 (1990) (Southwestern Bell).

[19] *Id.* at 11, *citing* United States General Accounting Office Report to Congressional Requestors, Telecommunications FCC's Oversight Efforts to Control Cross-Subsidization, at 12 (February 1993) (finding instances of misallocation totalling $300 million in which LECs charged expenses to their regulated businesses and their affiliates overcharged regulated carriers for services and supplies).

[20] *Id.* at 13.

[21] Nextel Comments at 12, *citing* "Effect of Video Dialtone Cross-Subsidies on Price Cap Carriers," Report by Snavely, King & Associates, Inc., prepared for Cox Enterprises, Inc., filed in CC Docket No. 94-1, Price Cap Performance Review for Local Exchange Carriers (June 1995), attached.

[22] AirLink Comments at 2-6; MCI Comments at 10.

[23] BellSouth Reply at 23-24.

[24] AT&T Comments at 7; Sprint Comments at 2-3.

exclusive volume-based interconnection agreements between BellSouth and its cellular affiliate in exchange for capacity on the cellular system.[25] In the case of integrated resold cellular and local exchange service, Sprint contends that a LEC could, by hiding its cellular sales costs and actual losses through bundling cellular and local exchange offerings, cross-subsidize its resale of cellular service by allocating what would have been over-earnings at the local level to the resale of cellular service at less than market returns or losses on cellular sales, thus reducing local earnings. In addition, common expense categories could be misallocated to local exchange rather than resold cellular operations.[26]

Sprint explains that there are several weaknesses in BellSouth's claim that the obligations of its facilities-based cellular provider to provide service for resale to all takers at the same price, combined with the Commission's affiliate transaction rules will protect against cross-subsidy, not the least of which is the fact that local exchange revenues are accounted for on a local and not a federal basis. Sprint observes that the fact that BellSouth cellular offers a bulk service discount does not establish the existence of a "market price" for purposes of CC-Docket No. 86-111 and the Commission Rule's Section 32.27 purposes. Sprint states that cellular service is untariffed, and if there are no other significant resale purchasers at the "wholesale for resale" price provided to the BellSouth LEC, a "resale market price" has not been established. Thus, Sprint claims that the fully distributed cost of service must be established and paid by the BOC if direct resale of its affiliate's cellular service is permitted.[27]

In response, BellSouth argues that the only valid issue raised by the opponents is whether its LEC subsidiary, BST, will be likely to subsidize its own resale of cellular service, and that the simple answer is that BST will have no meaningful opportunity or incentive to engage in such cross-subsidization. BellSouth claims that BST would be reselling cellular service as a convenience to customers and to remain competitive, and that it has no incentive to use anticompetitive tactics to dominate a business that "is at best a side line."[28] BellSouth states that cellular resale provides no greater opportunities or incentives for cross-subsidization than exist in facilities-based PCS or SMR service, so that the same safeguards should suffice.[29]

3. Interconnection Issues

The BOCs argue generally that structural separation is no longer required to deter discriminatory interconnection practices. According to BellSouth, the Commission initially

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[25] AT&T Comments at 7-8.

[26] Sprint Comments at 2-3.

[27] Sprint Comments at 2-3 & n.5.

[28] BellSouth Reply at 23-24.

[29] BellSouth Reply at 27.

took a very cautious approach to interconnection for cellular service, which was not then operational, by requiring both structural separation and nondiscriminatory interconnection, including requirements that LECs provide reasonable interconnection to cellular carriers, that landline cellular applicants to disclose their interconnection plans, and conditioning landline cellular license awards on the provision of nondiscriminatory interconnection to the competing cellular carrier. Since that time, the Commission, according to BellSouth, has issued a series of increasingly detailed policy determinations concerning interconnection that require LECs to provide cellular carriers with reasonable, nondiscriminatory interconnection and to negotiate interconnection arrangements in good faith. In addition, BellSouth notes that the Commission's complaint process is available to facilitate compliance.[30]

BellSouth maintains that the cellular industry has been successful in obtaining reasonable and nondiscriminatory interconnection from LECs, including GTE which is not under a structural separations requirement, thus evidencing a lack of interconnection problems. Further, BellSouth claims that its LEC subsidiary provides interconnection services to cellular and other mobile carriers in each of the nine states in its region. In eight states, these arrangements are provided under tariff and by PUC-approved contract in the other state. Under these circumstances, BellSouth argues that there is no realistic potential for interconnection abuse because any facilities-based cellular carrier can obtain interconnection on the same basis as any other, and the reseller in turn obtains pre-packaged interconnected service from the facilities-based cellular carrier.[31]

AT&T, MCI and Nextel challenge BellSouth's assertions that deterrence of discriminatory interconnection arrangements is no longer a reason to retain the structural separation requirement Nextel maintains that because a LEC with wireless operations potentially will compete against other unaffiliated wireless service providers within its market, which are wholly dependent on the LEC for interconnection to the local exchange, the LEC is incented to disadvantage its competitors regardless of whether it is a facilities-based cellular provider or a reseller of cellular service. Moreover, Nextel argues that joint offerings of cellular and landline service present new reasons to discriminate against those who sell unbundled services.[32]

Nextel maintains that LEC/CMRS interconnection issues are, as the Commission itself has repeatedly recognized, vital to the development of wireless competition, and that many questions remain unresolved regarding the full extent of the BOC's interconnection obligations, including the extent and nature of the BOC's mutual compensation obligations.[33]

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[30] BellSouth Request at 10.

[31] BellSouth Request at 9-13.

[32] AT&T Comments at 10-12; MCI Comments at 10; Nextel Comments at 13.

[33] Nextel Comments at 13-14, *citing* the Commission's Equal Access and Interconnection proceeding in CC Docket No. 94-54.

Furthermore, the provision of standard interconnection arrangements under tariff does not disclose the specifics of the interconnection arrangements and does not readily enable detection of discriminatory interconnection policies, according to Nextel.[34] Sprint notes that despite the provision of standard physical interconnection arrangements with CMRS carriers under tariff in most states, the LECs continue to retain the power and incentive to abuse the interconnection negotiation process, by, for example, denying new forms of interconnection that do not advantage the LEC's CMRS affiliate in the marketplace. Sprint argues that static interconnection tariffs do not protect against prospective abuse by BellSouth LECs if they refuse to negotiate new interconnection arrangements or continue to fail to meet their mutual compensation obligations.[35]

In response to opponents, BellSouth states that the Commission has repeatedly found, and has done so as late as October, 1994, that its existing interconnection policies are sufficient to deter discriminatory interconnection even when LECs operate cellular, PCS, or SMR facilities without structural separation, and that the claims to the contrary made by opponents of its Request "cannot be taken seriously."[36]

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[34] *Id.* at 14-15.

[35] Sprint Comments at 3-4.

[36] BellSouth Reply at 17. This is a significant issue in light of the Commission's recent action regarding LEC/CMRS interconnection.

APPENDIX B:
Record on the PCS Nonstructural Safeguards Plan filed by Pacific Telesis

1. Cellular/PCS Regulatory Parity

AirTouch, Cox and Nextel contend that in the *Broadband PCS Order* the Commission did not consider the possibility that a LEC, such as PacTel, would spin-off its cellular interests and thereby be able to offer PCS in its wireline service area under a 30 MHz PCS license, but rather contemplated that LECs would be constrained by their cellular interests and therefore would only be able to acquire 10 MHz .[1] AirTouch also argues that it is inconsistent for the Commission to require BOCs with cellular interests to place their cellular operations in structurally separate subsidiaries and not to impose a similar requirement on BOCs that have PCS operations.[2] AirTouch, Cox and Nextel contend that under the present circumstances the Commission should impose a structural separation requirement on PacTel.[3] In its February 14, 1996 *ex parte* letter, AirTouch contends that nothing in the 1996 Act changes the Commission's ability to impose structural separation for LEC-CMRS if the Commission believes that structural separation will best promote the open, competitive markets the Act hopes to encourage.[4]

PacTel responds that the *Broadband PCS Order* clearly permits any BOC without attributable cellular interests to acquire a 30 MHz PCS license in its serving territory and that when the Commission included this language in the *Broadband PCS Order*, it was well aware of PacTel's plan to spin-off its cellular interests and bid for large PCS licenses.[5] In response to AirTouch's regulatory parity argument, PacTel notes that in the *Broadband PCS Order* the Commission specifically stated that there was not enough information in the record for the Commission to eliminate the separate subsidiary requirement for BOCs providing cellular service.[6]

2. Cross-Subsidization

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[1] AirTouch Comments at 5; Cox Comments at 4, 9; Nextel Comments at 12-13.

[2] AirTouch Comments at 4-8.

[3] *See* AirTouch Comments at 4-8; Nextel Comments at 12-13; Cox Comments at 34. In support of its argument, Cox cites to the then pending telecommunications legislation. Cox states that under the proposed legislation BOC entry into markets such as long distance, video dialtone, manufacturing, telemessaging, alarm monitoring and payphone services is conditioned on the BOC's establishment of structurally separate subsidiaries to provide these services. *Id.*

[4] AirTouch February 14., 1996 Letter, attachment at 2.

[5] PacTel Reply Comments at 2-4 (citing *Request by Pacific Telesis Group and PacTel Corporation for a Waiver of Section 99.204 of the Commission's Rules, Order*, 10 FCC Rcd 168 (1994)).

[6] *Id.* at 7 (citing *Broadband PCS Order* at para. 126 n. 98; *Second CMRS Report and Order* at para. 218).

Cox, Nextel and Sprint all attack PacTel's Plan as insufficient to prevent cross-subsidization. Cox argues that the Commission's cost allocation, affiliate transaction, and other *Computer III* safeguards were not designed to address LEC diversification into quasi-regulated markets that compete against the core LEC monopoly. Cox states that the effectiveness of *Computer III*-type nonstructural safeguards is in doubt because of the Ninth Circuit decision vacating and remanding these rules. Cox argues that the Commission's price cap regulations do not adequately protect against cross subsidization. Cox cites a report prepared by the CPUC Division of Ratepayer Advocates ("DRA") that Cox describes as finding PacTel "engaged in extensive cross-subsidization despite the presence of numerous accounting 'safeguards'." Cox also questions PacTel's accounting for past PCS investment. Cox argues that the Commission should require PacTel to fully disclose its PCS costs and revenues on a line-item basis.[7]

Nextel states that if *Computer III* nonstructural safeguards are to be used for LEC PCS, they must be modified to reflect differences between wireless and enhanced services. Nextel claims that PacTel's Plan is deficient because the Plan identifies legal, management, personnel and systems operation staff resources that Pacific Bell will devote to its PCS affiliate, but it fails to allocate any direct or joint and common costs associated with these resources to PCS.[8] Nextel asks that the Commission require Pacific Bell to comply with expanded cost allocation and affiliate transaction rules and to disclose the scope of its PCS affiliates' activities.[9]

Sprint argues that Pacific Bell's pricing of facilities to its PCS affiliate will likely be done as a "special assembly," allowing Pacific Bell to use "cost" as the basis of providing this service because the service is unique and not otherwise available. Sprint makes three cost accounting recommendations. First, it recommends that contracts for wireless transactions between members of the Pacific Bell family be filed with the Commission. Second, it recommends that Pacific Bell be required to undertake a more detailed separation of its PCS-related costs from its other telephony costs. Third, it states that independent auditors should certify in their annual attestation letter that Pacific Bell is allocating properly all PCS related costs to nonregulated accounts.[10]

PacTel responds that, with regard to past PCS costs, most development costs were born by shareholders, but that a small portion of these costs were paid by Pacific Bell and that these costs have already been refunded to ratepayers.[11] PacTel responds further that it

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[7] Cox Comments at 22-31 (*citing State of California v. FCC*, 39 F.3d 919 (9th Cir. 1994)).

[8] Nextel Comments at 5, 9; *see also* Cox Comments at 25-26.

[9] Nextel Comments at 8.

[10] Sprint Comments at 16-18.

[11] PacTel Reply Comments at 12-14, 26.

will not incur costs that are common to its regulated wireline service and its PCS. PacTel explains that its PCS network is separate from it wireline network and that it will have its own switches, base stations and antennas which will be solely used by PBMS. PacTel adds that the construction, management and maintenance of the PCS network will be done by employees of PBMS and that, unlike its video dialtone service, it PCS operations will not share basic wireline facilities. PacTel asserts that Cox's price cap argument "makes little sense" because PCS costs are unregulated and are therefore already removed from Pacific Bell's and Nevada Bell's price cap calculations.[12] PacTel also dismisses Cox's argument regarding the DRA report. PacTel states that the DRA is an advocacy group and is not an impartial auditor, and that DRA only found that it had concerns about "*possible*" cross subsidization. PacTel adds that the CPUC has not taken any action with respect to the report.[13]

3. Interconnection/Network Disclosure

Cox, Sprint and Nextel also challenge PacTel's Plan on grounds that it does not ensure that PacTel will not provide PBMS with more favorable interconnection arrangements than other CMRS providers. Cox argues that "PacTel's proffering of its intrastate interconnection tariff is an outright repudiation of the Commission's requisite standards for good-faith negotiation on the terms and conditions of interconnection." Cox also argues that the Plan fails because it does not explain how PacTel will meet mutual compensation requirements.[14] Cox maintains that, in order to ensure that PacTel does not engage in discriminatory interconnection, the Commission should require PacTel to: (1) comply with existing rules requiring good-faith negotiation of interconnection arrangements; (2) provide meaningful cost support to justify any interconnection arrangements it offers to its PCS affiliates; (3) demonstrate, by means of a certified interconnection agreement with a non-affiliated PCS provider, that it faces demonstrable competition from a facilities-based competitor prior to its implementation of downward pricing flexibility mechanisms (such as the term discount proposed in the Plan); (4) make mutual compensation available to affiliated and non-affiliated PCS providers for termination of one another's traffic; and (5) meet its long-standing common carriage obligations, as reflected recently in the Commission's ONA and expanded interconnection proceedings, to make the same terms, conditions and type of interconnection available to non-affiliated PCS competitors that it makes available to its own PCS affiliate.[15]

Cox, Nextel and Sprint also assert that they should have the same ability as PBMS to physically locate equipment on Pacific Bell's property. They argue, that under the principles of the Commission's CC Docket 91-141 Expanded Interconnection requirements, that all

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[12] *Id.* at 16-22.

[13] *Id.* at 23, 24 (emphasis original),26.

[14] Cox Comments at 37, 42-47.

[15] Cox Comments at 50.